TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	2
Consolidation of Brief in Opposition	2
Question Presented	2
Statement of the Case	3
Summary of Argument	4

Argument:

I. This case has a narrow scope and is of no general interest or public importance. The facts are unique and do not apply to any other land. No conflict among courts of appeal is involved here, nor is there any dispute about the general principles of law which are controlling. At issue is only the application of these principles to a limited and particular fact situation which can only concern these litigants 5

II. Petitioners' construction of the legal status of the treaties and the tribes is incorrect 9

III. No reasonable interpretation of these treaties, which have only the force and effect of statutes, or of these patents would permit the inclusion of the river bed in the grants to Petitioners 13

IV. The courts below reasonably and properly held that the treaties and the patents did not provide for conveyance of the land in dispute to Petitioners or either of them 14

V. The facts and holding in Holt State Bank have been misunderstood and misconstrued by Pe-

TABLE OF CONTENTS CONTINUED

PAGE

titioners and by Amicus Curiae. The Court of Appeals was correct in construing and applying Holt State Bank ——— 21

VI. The United States always retained the intention, the right, and the power to include the lands conveyed to Petitioners in a future state, either through agreement with Petitioners or otherwise ——— 25

VII. Comments on Memorandum of United States as Amicus Curiae ——— 30

Conclusion ——— 33

TABLE OF AUTHORITIES

CASES:

City of Tulsa v. Commissioners, 101 P.2d 246 (Okla. 1940) ——— 31

Hartford Acc. & Indem. Co. to Use of Silva v. Interstate Equipment Corp., 176 F.2d 419 (3d Cir. 1949), cert. den. 338 U.S. 899, 94 L.Ed. 553 ——— 6

Helvering v. Winmill, 305 U.S. 79, 83 L.Ed. 52 (1938) 16

Lau Ow Bew, Ex parte, 141 U.S. 583, 35 L.Ed. 868 (1891) ——— 9

Lynch v. Clements, 263 P.2d 153 (Okla. 1953) ——— 31

Petition of Finance Committee of Legislature of Virgin Islands, 242 F.2d 902 (C.A. Virg. Is. 1957) ——— 17

Pollard v. Hagan, 3 How. 212, 11 L.Ed. 565 (1845) ——— 7, 29

Shively v. Bowlby, 152 U.S. 1, 38 L.Ed. 331 (1893) ——— 24

State v. Nolegs, 139 Pac. 943 (Okla. 1914) ——— 12

The Cherokee Nation or Tribe of Indians in Oklahoma, et al. v. State of Oklahoma, et al., 402 F.2d 739 (10th Cir. 1968) ——— 1, 30

United States v. Holt State Bank, 270 U.S. 49, 70 L.Ed. 465 (1925) ——— 4, 8, 21, 23-24, 25, 26, 29, 30

AUTHORITIES CONTINUED PAGE

United States v. Magnolia Petroleum Company, 110 F.2d 212 (10th Cir. 1939) ____ 12

United States v. State of Alaska, et al., Civil A-152-67, D.C. Alaska ____ 33

Vickery v. Yahola Sand & Gravel Co., 12 P.2d 881 (Okla. 1932) ____ 7, 17-20

Zemel v. Rusk, 381 U.S. 1, 14 L.Ed.2d 179 (1965) ____ 16-17

STATUTES AND TREATIES:

28 U.S.C.A. Sec. 1651 ____ 6

Act Providing for Final Disposition of Affairs of Five Civilized Tribes, April 26, 1906, 34 Stat. L. 137 ____ 10

Cherokee Allotment Act, July 1, 1902, 32 Stat. L. 716 ____ 10

Chippewa Treaty of September 30, 1854, 10 Stat. L. 1109 ____ 21-22

Chippewa Treaty of February 22, 1855, 10 Stat. L. 1165 ____ 22

Choctaw and Chickasaw Allotment Act, July 1, 1902, 32 Stat. L. 641 ____ 10

Joint Resolution Extending Tribal Existence, etc., March 2, 1906, 34 Stat. L. 822 ____ 11

Treaty of April 30, 1803, 8 Stat. L. 200 ____ 26

Treaty of Dancing Rabbit Creek, September 27, 1830, 7 Stat. L. 333 ____ 6

Treaty of New Echota, December 29, 1835, 7 Stat. L. 478 ____ 6

MISCELLANEOUS:

Bowers, Jefferson in Power, p. 213 ____ 27

Letter dated March 26, 1908 from Acting Commissioner of Indian Affairs to the Secretary of the Interior ____ 16

AUTHORITIES CONTINUED PAGE

Letter dated November 25, 1836, from Elias Boudinot to John Ross, Senate Document No. 281, 52d Congress, 1st Session 27

Message to Congress of President Thomas Jefferson, Messages and Papers of the Presidents, Vol. 1, p. 346 26

Mills, Oklahoma Indian Land Laws, Thomas Law Book Co., 1924 10

Papers and Correspondence on the Removal of the Cherokees (1835-37), U.S. Dept. of Int. Library, E99 C5 U5 28

Patent dated December 31, 1838 from United States to the Cherokee Nation, Patent Records, Bureau of Land Mgt., Dept. of Interior 29

Patent dated March 23, 1842 from United States to the Choctaw Nation, Patent Records, Bureau of Land Mgt., Dept. of Interior 28-29

Supreme Court Rules, Rule 19(b) 6, 8

82 C.J.S. "Statutes," Sec. 359 17

APPENDIX

A. Pretrial Order of the United States District Court for the Eastern District of Oklahoma filed September 25, 1967 ..... i-x

B. Amendment to Pretrial Order of United States District Court for the Eastern District of Oklahoma filed on October 10, 1967 xi

C. Judgment of United States District Court for the Eastern District of Oklahoma filed on November 15, 1967 ..... xii-xiii

D. Chapter 2 of Mills, Oklahoma Indian Land Laws, Thompson Law Book Co., 2d Ed., 1924 ..... xiv-xxi

In the
Supreme Court of the United States
OCTOBER TERM, 1968

Nos. 976 and 1104

THE CHOCTAW NATION AND THE CHICKASAW NATION,
Petitioners,

VERSUS

STATE OF OKLAHOMA, ET AL.,
Respondents.

THE CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA,
Petitioner,

VERSUS

STATE OF OKLAHOMA, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION OF THE CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA, AND TO PETITION OF THE CHOCTAW NATION AND THE CHICKASAW NATION

OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 402 F.2d 739. A copy of the orders of the District Court for the Eastern District of Oklahoma and of its judgment are included as Appendices A, B, and C.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petitions.

CONSOLIDATION OF BRIEF IN OPPOSITION

This was one case in the District Court and treated as one case in the Court of Appeals. Respondents file a consolidated brief in opposition to the petitions filed by both The Cherokee Nation or Tribe of Indians in Oklahoma (designated hereinafter sometimes as "the Cherokees") and The Choctaw Nation and The Chickasaw Nation (designated hereinafter sometimes as "the Choctaws") all of said petitioning parties also being designated hereinafter sometimes as "Petitioners." The purpose of consolidation is to avoid needless repetition, for though the Cherokee claims and the Choctaw claims are based on different treaties and patents, the legal principles in the interpretation thereof are the same. On this basis Respondents filed a consolidated brief in the District Court and in the Court of Appeals.

QUESTION PRESENTED

Respondents controvert the statement of the Questions Presented in the Petition of the Cherokees and the statement of the Questions Presented in the Petition of the Choctaws, on the ground that each of those statements ignores the real question which Respondents submit is this:

> In the treaties with the Cherokees and the Choctaws, and in the patents authorized by the treaties, did the United States definitely and plainly express an intention to convey the river bed of the Arkansas River in Oklahoma below its confluence with the Grand River to the Cherokees or the Choctaws?

STATEMENT OF THE CASE

This is an action to quiet title and for an accounting. It was filed in December, 1966 by the Cherokees against Respondents. The Choctaws intervened. No suit involving this subject matter had been filed before that time by either. The Cherokees and the Choctaws asserted conflicting claims. Respondents, the State of Oklahoma and its lessees, filed answers and cross-petitions to quiet title against the Cherokees and the Choctaws.

The subject matter of the litigation is certain land in Oklahoma consisting of the bed of the Arkansas River from its confluence with the Grand River to the Oklahoma-Arkansas state line. The navigability of this stretch of the river was not disputed in the Court of Appeals.

The Cherokees claim under certain treaties with the United States contained in the Statutes at Large and under a patent. The Choctaws also claim under certain treaties with the United States contained in the Statutes at Large and under a patent.

Oklahoma claims the bed of this navigable stream by virtue of its sovereignty and admission to the Union on an equal footing with the original states and has asserted its ownership actively since statehood on November 16, 1907.

The District Court and the Court of Appeals construed the treaties and patents and held that they did not provide for conveyance of the river bed to either of Petitioners and that title is vested in the State. In view of this holding, neither court expressed any opinion on the conflicting claims of Petitioners.

SUMMARY OF ARGUMENT

I. This case has a narrow scope and is of no general public interest or importance. The facts are unique and do not apply to any other land. No conflict among courts of appeal is involved here, nor is there any dispute about the general principles of law which are controlling. At issue is only the application of these principles to a limited and particular fact situation which can only concern these litigants.

II. Petitioners' construction of the legal status of the treaties and the tribes is incorrect.

III. No reasonable interpretation of these treaties, which have only the force and effect of statutes, or of these patents would permit the inclusion of the river bed in the grants to Petitioners.

IV. The courts below reasonably and properly held that the treaties and the patents did not provide for conveyance of the land in dispute to Petitioners or either of them.

V. The facts and holding in *Holt State Bank* have been misunderstood and misconstrued by Petitioners and by Amicus Curiae. The Court of Appeals was correct in construing and applying *Holt State Bank*.

VI. The United States always retained the intention, the right, and the power to include the lands conveyed to Petitioners in a future state, either through agreement with Petitioners or otherwise.

VII. Comments on Memorandum of United States as Amicus Curiae.

ARGUMENT

I

THIS CASE HAS A NARROW SCOPE AND IS OF NO GENERAL INTEREST OR PUBLIC IMPORTANCE. THE FACTS ARE UNIQUE AND DO NOT APPLY TO ANY OTHER LAND. NO CONFLICT AMONG COURTS OF APPEAL IS INVOLVED HERE, NOR IS THERE ANY DISPUTE ABOUT THE GENERAL PRINCIPLES OF LAW WHICH ARE CONTROLLING. AT ISSUE IS ONLY THE APPLICATION OF THESE PRINCIPLES TO A LIMITED AND PARTICULAR FACT SITUATION WHICH CAN ONLY CONCERN THESE LITIGANTS.

The subject matter of the case is a narrow strip of land in eastern Oklahoma. The facts involved in the case are unique and do not involve any other land anywhere else. The State of Oklahoma is litigating in effect with two organizations of certain citizens of that State to determine who owns this strip of land (the members of the Cherokee tribe and of the Choctaw and the Chickasaw tribes predominately are citizens of the State and have been so since statehood). The treaties (which as we will point out later have the status of statutes) and the patents were studied and construed by two able courts below and each court found that they did not provide for the conveyance of the river bed to either of the Petitioners. The treaties (statutes) and patents in question do not apply to or relate to any other land in the United States other than the strip of land in eastern Oklahoma known as the bed of the Arkansas River in the area involved in this suit. The courts below found that references to the river contained in the treaties and patents were for the purpose of fixing boundaries, monuments or reference points and were not for the

purpose of conveying the entire river bed. This was a reasonable and proper construction. And this being a reasonable and proper construction, what purpose can be served by submitting the same treaties (statutes) and patents to another court for construction? Respondents submit that no reason exists for review of the lower court's opinion on certiorari.

The extraordinary writ of certiorari may not be invoked in lieu of appeal. *Hartford Acc. & Indem. Co. to Use of Silva* v. *Interstate Equipment Corp.*, 176 F.2d 419 (3d Cir. 1949), *cert. den.* 338 U.S. 899, 94 L.Ed. 553; 28 U.S.C.A. Sec. 1651. Although, as stated in Rule 19(1) of the Supreme Court Rules, its issuance is not a matter of right, but of sound judicial discretion, ". . . [the writ] will be granted only where there are special and important reasons therefor." It is submitted that no such reasons here exist.

Petitioners seek review of a decision of a court of appeals, concerning which subsection (b) of Rule 19 lists the grounds for exercise of this Court's discretion in all but the most exceptional cases.

First, this Court will issue a writ where ". . . a court of appeals has rendered a decision in conflict with another court of appeals on the same matter." No conflict among circuits exists here, nor could any exist. The treaties at issue in this case, The Treaty of New Echota of December 29, 1835 between the United States and the Cherokee Nation, 7 Stat. L. 478, and the Treaty of Dancing Rabbit Creek of September 27, 1830 between the United States and the Choctaw Nation, 7 Stat. L. 333, provided for

the removal of the Nations concerned to lands lying entirely within what is now the State of Oklahoma, and the river bed at issue here lies entirely within such Oklahoma lands. No other court of appeals has ever construed or will ever construe these treaties with respect to these lands, nor will other courts of appeal ever construe similar treaties, for New Echota and Dancing Rabbit were specifically, exclusively and peculiarly limited to the removal of these Civilized Tribes, the Cherokees and the Choctaws (and Chickasaws), from the South to Oklahoma.

Second, a writ may issue where a court of appeals ". . . has decided an important state or territorial question in a way in conflict with applicable state or territorial law." Here, on the contrary, the decision of the Court of Appeals squarely affirms state law on the precise question at issue here, as expressed by the Oklahoma Supreme Court in 1932, in *Vickery* v. *Yahola Sand & Gravel Co.*, 12 P.2d 881, discussed in Section IV of this brief; and affirms also the action of the executive branch of the Oklahoma State government in its exercise of active dominion over the lands here in controversy since statehood in 1907.

Third, a writ will issue where a court of appeals ". . . has decided an important question of federal law which has not been, but should be settled by this court, or has decided a federal question in a way in conflict with applicable decisions of this court." Here, it is submitted, the questions of federal law involved are the existence of the "doctrine of equal footing" stated by this Court in 1845 in *Pollard* v. *Hagan*, 3 How. 212, 11 L.Ed. 565, and unchallenged since; and the rule of construction which governs the interpretation of purported grants by the United States

of lands beneath navigable waters which otherwise would be held in trust for future states under the doctrine of equal footing, set forth most pertinently here by this Court in 1925 in *United States of America* v. *Holt State Bank*, 270 U.S. 49, 70 L.Ed. 465. Neither the doctrine of equal footing nor the *Holt State Bank* rule of construction are questioned by Petitioners here, who challenge only their application to a unique fact situation which concerns only these particular Indians, arising out of only their particular treaties, and having application only to the ownership of a narrow strip of river bed in Eastern Oklahoma.

That there is no error of law apparent on the record, nor any misapplication of opinions of this Court by the courts below in this cause, will be demonstrated in Sections II-VII of this brief.

Fourth, a writ may issue under the standards of Rule 19(b) where a court of appeals ". . . has so far departed from the acceptable and usual course of judicial procedures, or so far sanctioned such departure by a lower court, as to call for an exercise of this court's power of supervision." No contention is made by Petitioners here of any such departure, or of any jurisdictional or procedural irregularity or even of any abuse of discretion by either court below. Petitioners have had their full and fair days in court, and now complain only of the results.

In addition to the reasons set forth in Rule 19(b), certiorari has been granted where important constitutional questions are presented, or where international relations may be affected. Neither of these grounds is applicable here.

Finally, it is said that a writ of certiorari should be exercised sparingly, and should only issue in cases of peculiar gravity and general importance. *Ex parte Lau Ow Bew*, 141 U.S. 583, 35 L.Ed. 868 (1891). For this reason, perhaps more than any other, Respondents submit that certiorari here is inappropriate, for this case is of utterly no general public importance. It affects only a narrow strip of land in eastern Oklahoma, and only these litigants and those claiming under them. It can involve no other river bed even in Oklahoma, for among Oklahoma rivers only the Arkansas is navigable and its entire navigable portion is at issue in this case. The treaty interpretations required here can affect lands in no other state, nor any other citizens. In reality, this case represents only a quiet title suit between the State of Oklahoma and certain of its own citizens, for the resident members of the Cherokee, Choctaw and Chickasaw tribes have all been citizens of the State of Oklahoma since statehood.

II

PETITIONERS' CONSTRUCTION OF THE LEGAL STATUS OF THE TREATIES AND THE TRIBES IS INCORRECT.

Respondents submit that throughout the petitions filed by the Cherokees and by the Choctaws and the memorandum for the United States as *amicus curiae* there are certain fundamental fallacies as to the status of the "treaties" as obligations of the United States, and as to the status of the Cherokees and the Choctaws as autonomous political bodies.

First, the treaties invoked are not contracts and confer no vested rights. "Such treaties are not contracts and con-

fer no vested rights upon the tribes which are within the protection of the Constitution. They are effective not as treaties, but as acts of Congress and do not impair the power of Congress to further legislate on the same subject matter, even in violation of the terms of the treaties." Chapter 2 of Mills, Oklahoma Indian Land Laws, Thomas Law Book Co., 2d Ed., 1924. Respondents include as Appendix D a copy of chapter 2 of this highly respected authority which places a suitable perspective on the legal status of the treaties cited by Petitioners.

Second, neither the Cherokees nor the Choctaws have full legal autonomy and their status has a most limited and restricted nature.

In the opinion below[1] the court summarized the present status of the Indian Tribes involved, pointing out that the Choctaws[2] and the Cherokees[3] entered into agreements with the United States providing for the extinguishment of tribal titles to land, nullifying treaties inconsistent therewith, and providing for the allotment of lands. The opinion further points out that the Act of April 26, 1906, 34 Stat. L. 137, provided for the final disposition of the affairs of the Five Civilized Tribes, including the Choctaws and the Cherokees.

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[1] 402 F.2d 739.

[2] Act of July 1, 1902. Agreement between the United States and the Choctaws and Chickasaws, 32 Stat. L. 641.

[3] Act of July 1, 1902. An Act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes, 32 Stat. L. 716, was the subject of a special election by the Cherokees and resulted in Cherokee ratification on August 7, 1902.

The Choctaw-Chickasaw Agreement and The Cherokee Agreement both provided for expiration of tribal governments on March 4, 1906, incident to the enrollment, allotment, and granting of U. S. citizenship to the members of the tribes, which events were intended to dissolve such sovereignty as the nations possessed. However, this dissolution was forestalled by "Joint Resolution Extending the Tribal Existence and Government of the Five Civilized Tribes of Indians in the Indian Territory," Act of Congress, approved March 2, 1906, 34 Stat. L. 822 which provided:

> "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law."

Hence, although the United States assumed primary administration of tribal affairs, which administration has been and is continuing by successive Acts of Congress, the tribes are now maintaining only an empty shell of *de jure* government asserting and collecting claims under special legislation and instituting actions seeking recovery of purported tribal lands, and other similar activities. Here, purely in this "winding up" process Petitioners (who now only through sheer technicality still are referred to as "Nations") now seek for the first time to assert title to

lands over which the State of Oklahoma has exercised active dominion consistently for more than sixty years, since statehood in 1907.

In this connection, all residents of Choctaw and Cherokee extraction exercise the rights and privileges of citizenship. The "blanket" status often attributed to reservation Indians has no application to the Cherokee or Choctaw or Chickasaw Indians in Oklahoma. Since 1907, they have conducted their own personal affairs; they are educators, lawyers, doctors, secretaries, clerks, carpenters, brick masons, engineers, airplane pilots, painters, poets, musicians, and so on. Many thousands of Oklahomans are proud of their Indian heritage but certainly would resent the implication that they have any citizenship other than in the United States and the State of Oklahoma.

Further, if the rule followed by the Court of Appeals in *United States* v. *Magnolia Petroleum Company*, 110 F.2d 212 (10th Cir. 1939), dealing with strips and gores caused by abandoned railroad grants, is applied to riparian allotments made by Petitioners, the allottees of Petitioners or their successors in interest, many of whom are non-Indians, and not Petitioners themselves, would benefit from a reversal of this case. Representatives of certain non-Indians appeared as *amicus curiae* in the District Court and the Court of Appeals in pursuit of such claims.

III

NO REASONABLE INTERPRETATION OF THESE TREATIES (WHICH HAVE ONLY THE FORCE AND EFFECT OF STATUTES) OR OF THESE PATENTS WOULD PERMIT THE INCLUSION OF THE RIVER BED IN THE GRANT TO PETITIONERS.

The District Court took judicial notice (not challenged by Petitioners) ". . . that from at least as early as 1824 until sometime after November 16, 1907 the Arkansas River in its natural state was a navigable river below its confluence with the Grand River, regularly used throughout the remainder of its course in what is now Oklahoma as a highway of commerce during the major portion of each year." This fact of navigability must be considered in reading the treaties with the Cherokees attached to their petition and the treaties with the Choctaws mentioned in their petition. In the Cherokee treaties mention is made of other Indian tribes in the area—The Creeks—The Osages—The Quapaws, and other tribes. Fort Gibson, a substantial army post, had been established at the head of the navigable waters in controversy in 1824. The District Court concluded ". . . *this stretch of the Arkansas River was navigable in fact and in law at the time the western domains, now a part of Oklahoma, were ceded to the Choctaw Nation and to the Cherokee Nation and at the time the treaties were made pursuant to which the lands were ceded.*" The rights of the Creeks, the Osages, and other Indian tribes to use the river, the rights of the United States government and of the people generally to use the river were preserved by keeping the river bed in public hands—the United States—and later the State of Oklahoma.

What have Petitioners to offer to show this public highway of commerce was conveyed to them? Mere references to the Arkansas River—obviously as a boundary, a monument or a reference point. There is no language in any treaty or patent that can be read to include the entire river bed. We find references to "commencing at that point on Arkansas River," "to the main branch of Arkansas River," "down said river," "thence up the Arkansas," "to the Arkansas River" and like expressions in the treaties and patents, but no language that would include the bed of a river then known to be and recognized to be a navigable stream. The burden of proving the inclusion of the river bed under the treaties or patents lies on Petitioners—and in this they have failed. The argument of Petitioners rests on inferences—not on the definite expressions required in conveyancing.

As the courts below both found, no reasonable construction, *using ordinary standards of interpretation*, would permit the inclusion of the river bed under the language that was used in the treaties and patents.

IV

THE COURTS BELOW REASONABLY AND PROPERLY HELD THAT THE TREATIES AND THE PATENTS DID NOT PROVIDE FOR CONVEYANCE OF THE LAND IN DISPUTE TO PETITIONERS OR EITHER OF THEM.

The respective petitions filed herein present an interesting, voluminous and irrelevant mass of historical data. However, assuming some relevancy for the sake of argument, the facts are not as one-sided as Petitioners would have the Court believe, and there were strong differences

in opinion among the leading members of the Indian Tribes involved, some of them favoring the actions which eventually were taken by the Federal government, and some opposing. Respondents could marshal before this Court a great amount of historical data that would show the viewpoint of the members of the leading factions who favored removal and who understood and expected statehood to follow. The United States never abandoned the intention eventually of including all whites and Indians who moved westward as citizens in one or more states. That was the original purpose adopted for the western lands acquired in the Louisiana Purchase and the consistent pattern of the developing country.

Notwithstanding all of the lengthy accounts of bureaucratic, tribal and other governmental discussions and proceedings contained in the petitions, in the last analysis we *must look to see what the parties actually did.* We must look to the treaties themselves and to the patent and see just what was said in them. *In the judgment of the courts below there was no ambiguity on the subject in controversy in this case. The treaties and the patents clearly did not provide for conveyance of the bed of the river in litigation here to either the Cherokees or the Choctaws. That being true, no reservation of the river bed was necessary for the United States to retain it.*

Ownership of this river bed had been asserted by Oklahoma for nearly sixty years prior to the filing of this suit through the extraction of untold tons of sand and gravel by its lessees and permittees and through the granting of oil and gas leases.

The Department of the Interior concurred in Oklahoma's assertion of title. In a letter dated March 26, 1908[4] from Acting Commissioner of Indian Affairs, C. F. Larrabee, to the Secretary of the Interior, we find the following statement:

> " 'In other words, when the United States conveyed by warranty deed the lands occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles, it did not convey the ownership of the beds of navigable streams, but reserved them for the benefit of the future state within whose boundaries they would fall. Thus the State of Oklahoma, on its creation, became absolute owner of the bed of the Arkansas River, and the Cherokee Nation is not entitled to royalty for any sand or gravel taken from the bed of that river since November 16, 1907. Very respectfully,
>
> " '[Signed] C. F. Larrabee, Acting Commissioner.
>
> " 'March 27, 1908:
>
> " 'Approved: [Signed] Jesse E. Wilson, Secretary' "

The foregoing letter is of extreme importance here as direct evidence of long continued executive interpretation expressly placed upon the treaties involved in this litigation by the Department of the Interior, which is charged with their administration. Such long continued administrative construction has been held to have the effect of law. *Helvering* v. *Winmill,* 305 U.S. 79, 83 L.Ed. 52 (1938). It is always entitled to great weight by the courts faced with the task of construing the same treaties (statutes) and should not be overturned without cogent reasons. *Zemel*

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[4] Quoted by the Supreme Court of Oklahoma in *State* v. *Nolegs,* 139 Pac. 943, 945 (1914).

v. *Rusk*, 381 U.S. 1, 14 L.Ed.2d 179 (1965). See also the many authorities collected in 82 C.J.S. "Statutes," Sec. 359. This is especially true where such construction has been made by the highest officers in the executive department concerned, *Petition of Finance Committee of Legislature of Virgin Islands*, 242 F.2d 902 (C.A. Virgin Is. 1957), and here note that the foregoing letter was expressly approved by the Secretary of the Interior on March 27, 1908.

No change has been made by the Department of the Interior in its 1908 interpretation; nor was this interpretation challenged by the Petitioners until December, 1966 when they asserted their claims in court for the first time. Moreover, both the Department and Petitioners were silent when a certain Cherokee tribal member litigated the same issue through the Oklahoma Supreme Court in 1932. The same arguments presented here were decided adversely to the Cherokee allottee. In the case of *Vickery* v. *Yahola Sand & Gravel Co.*, Vickery, a Cherokee, held a Cherokee allotment abutting upon the Arkansas River a short distance below its confluence with the Grand River. He sued Yahola Sand & Gravel Co. to recover for sand and gravel it had removed from the river bed opposite Vickery's allotment. The trial court found for the defendant and on appeal to the Oklahoma Supreme Court the State intervened and filed a brief. The Court considered the pertinent treaties with the Cherokees, and furthermore considered whether it had been necessary for the United States to convey the bed of this navigable stream to the Cherokees in order "to carry out other public purposes appropriate to the objects of which the United States held the territory." *This is precisely the proposition argued by the Cherokees*

and the principle argued by the Choctaws. In holding in favor of the defendant and the state and against Vickery, the Cherokee allottee, the Court's opinion applied against the tribal claims as well as against the allottee when it said:

> "Considering the several Cherokee treaties, acts of Congress, and conveyances in the light of the times and circumstances in which they were made, and giving full force to the rule of interpretation set forth in the opinions of the Circuit Court of Appeals in the *Brewer-Elliott* case, *supra, nothing appears that would make it necessary to convey the bed of the navigable stream to the Cherokee Tribe in order to carry out any public purposes appropriate to the objects for which the United States held the territory embracing the lands granted.* The territory embracing the lands was a part of the Louisiana Purchase. The declared purpose of the Louisiana Purchase Treaty with France was that statehood should be ultimately conferred upon the inhabitants of the territory purchased, though this purpose was in a measure departed from in the treaties, in that by article 5, of the Treaty of New Echota (7 Stat. L. 481), it was provided: 'Article 5. The United States hereby covenant and agree that the lands ceded to the Cherokee nation in the foregoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory.' But ultimately the purpose, as originally declared, has been accomplished.
>
> "The only other purpose appropriate to the objects for which the United States held the land that has been suggested was to provide a permanent home for the several Indian Tribes.
>
> "[5, 6] We see nothing in the treaties or acts of Congress, considering the times and circumstances in which they were made, and the relation between the

contracting parties, that would render it necessary to convey the title to the bed of navigable rivers within the lands granted to the Cherokees in order to carry out the purpose of providing a permanent home for the tribe.

"On the other hand, it would appear to the best interests of the tribe in full enjoyment and possession of the home thus provided that the navigable rivers within the lands should be and remain public highways. The Cherokee Indians were not then extensively engaged in commerce but rather an agricultural people. Aside from marketing their agricultural products, their trade and commerce consisted largely of barter and trade between themselves and with certain designated and licensed traders permitted to trade within their country. It was highly necessary at that time, for the benefit of the Cherokees as well as other Indian tribes located on adjacent lands that the navigation of the Arkansas river, as far up its course as the same was navigable, be kept open and free, and for this purpose it would appear far better that the title to the bed of the stream, where navigable, be kept and held in the United States, for the ultimate use and benefit of the future state, if and when, by the consent of the Cherokee Tribe, a state should be erected embracing the land so granted to them.

"This would be in accord with the general policy of the United States and the theory upon which the Congress of the United States has constantly acted in disposing of the public lands, stated in *Shively* v. *Bowlby*, *supra*, as follows: 'The congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high-water mark, may be taken up by actual occupants, in order to encourage the settlement of the country, but that the navigable waters and the soils under them, whether within or

above the ebb and the flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation, and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government; but, unless, in case of some international duty or public exigency, shall be held by the United States in trust for the future states, and shall vest in the several states, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older states in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the state, after it shall have become a completely organized community.'

"We are, therefore, of the opinion that neither by express terms nor by intention of the contracting parties did the title to the bed of the Arkansas river, where the same was navigable in fact, pass from the United States to the Cherokee Nation within the bounds of the tracts of land granted by the United States to said tribe under and by virtue of the treaties mentioned, but that it was retained and held by the United States in trust for the then future state, and that upon admission of the state of Oklahoma to the Union in 1907, the title thereto vested in and became the property of the state of Oklahoma. The Cherokee Tribe having acquired no interest in or title to the bed of the Arkansas river below high-water mark where it flows along the land involved, it follows that plaintiff in error acquired no right, title, or interest in or to the lands within the bed of the river below high-water mark.

"The judgment is affirmed." (Emphasis ours.)

V

THE FACTS AND HOLDING IN *HOLT STATE BANK* HAVE BEEN MISUNDERSTOOD AND MISCONSTRUED BY PETITIONERS AND BY AMICUS CURIAE. THE COURT OF APPEALS WAS CORRECT IN CONSTRUING AND APPLYING *HOLT STATE BANK*.

With relation to the beds of navigable waters a special rule of construction was laid down by this Court in *Holt State Bank*. This Court there said that if the United States intends to dispose of lands in a territory under navigable waters, such intention must be definitely declared or otherwise made very plain.

Respondents find in both petitions and the memorandum of *amicus curiae* the persistent expression of a misunderstanding of the facts and a misconstruction of the holding of the Court in *Holt State Bank*. To correct this misunderstanding and misconstruction we will state our understanding of the facts and holding of the Court as it applies to this case.

Before Minnesota became a state in 1858, the Chippewas had been the aboriginal inhabitants of a large part of northern Minnesota, and in particular a part that encompassed a lake known as Mud Lake. By a series of treaties with the United States made before Minnesota statehood it was agreed that the Chippewas relinquish their aboriginal right of occupancy to the general area (not their title, for title was then in the United States by conquest from England), and that in exchange, title to certain areas known as "reservations" was vested in the Chippewas. Two of those treaties were cited in the opinion of the Court in *Holt State Bank* (Treaty of September 30, 1854, 10 Stat.

L. 1109 and Treaty of February 22, 1855, 10 Stat. L. 1165). Both treaties contain provisions for the eventual allotment of lands in the reservations to tribal members. One reservation was known as the Red Lake Indian Reservation. Mud Lake was within that reservation. In 1889, pursuant to an act of Congress, provision was made that the Chippewas should cede back to the United States most of the Red Lake Indian Reservation including the part in the vicinity of Mud Lake; that the United States should then divide the land thus ceded and classify it as pine lands and agricultural lands; that the United States should dispose of the lands for cash considerations; and that the sums realized should be put in an interest-bearing trust fund for the Chippewas and ultimately disbursed for their benefit or distributed among them. If the Chippewas had acquired no title to the Red Lake Reservation by the treaties prior to Minnesota statehood (as argued by counsel for Petitioners) why was provision made therein for allotment to tribal members and why was provision made in the 1889 Act to have the Chippewas cede the lands to be sold back to the United States? The United States did recognize the title of the Chippewas to the Red Lake Reservation and did not undertake to sell the lands located therein until they were ceded by the Chippewas back to the United States so that the United States could sell and convey them. Among the tracts disposed of as agricultural lands under this 1889 Act were certain tracts bordering on Mud Lake. These tracts were sold to certain settlers, who thus became riparian owners, and patents were issued to them. Later, when Mud Lake was drained, large areas of land were laid bare which were adjacent to the tracts on the shore of Mud Lake which had been sold to settlers. The riparian owners along the

lake front contended that the lake was navigable when Minnesota became a state and that under the laws of Minnesota they were entitled to the land laid bare by the drainage and adjacent to their tracts. On the other hand, the United States insisted in behalf of the Chippewas that the lake was never more than a mere marsh and was not navigable and therefore the United States was entitled and was duty bound to dispose of the land under the Act of 1889 for the benefit of the Chippewas. The Court held that Mud Lake was a navigable body of water, and that under the treaties with the Chippewas prior to Minnesota statehood, there was no definite declaration that the United States intended to convey the bed of the navigable water bodies to the Chippewas or to recognize the bed of the navigable water bodies as belonging to the Chippewas even though Mud Lake was entirely within the Red Lake Reservation, the title to which had been vested in the Chippewas. The Court accordingly held that the bed of Mud Lake, a navigable body of water, passed to the State of Minnesota upon statehood in 1858 and then passed to the riparian settlers when the lake was drained. The law applied to these facts is stated by the Court as follows:

> "It is settled law in this country that lands underlying navigable waters within a state belong to the state in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the states and with foreign nations, and subject to the qualification that where the United States, after acquiring the territory and before the creation of the state, has granted rights in such lands by way of performing international obligations, or effecting the use or improve-

ment of the lands for the purposes of commerce among the states and with foreign nations, or carrying out other public purposes appropriate to the objects for which the territory was held, such rights are not cut off by the subsequent creation of the state, but remain unimpaired, and the rights which otherwise would pass to the state in virtue of its admission into the Union are restricted or qualified accordingly. *Barney* v. *Keokuk*, 94 U.S. 324, 338, 24 L.ed. 224, 228; *Shively* v. *Bowlby*, 152 U.S. 1, 47, 48, 57, 58. 38 L.ed. 331, 348, 349, 352. 14 Sup.Ct.Rep. 548; *Scott* v. *Lattig*, 227 U.S. 229, 242. 57 L.ed. 490, 496. 44 L.R.A. (N.S.) 107. 33 Sup.Ct.Rep. 242; *Seattle* v. *Oregon & W. R. Co.*, 255 U.S. 56, 63. 65 L.ed. 500, 506. 41 Sup.Ct.Rep. 237; *Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U.S. 77, 83-85, 67 L.ed. 140, 144, 145, 43 Sup.Ct.Rep. 60. But, as was pointed out in *Shively* v. *Bowlby*, 152 U.S. 49, 57, 58, 38 L.ed. 349, 352, 14 Sup.Ct.Rep. 548, the United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future states, and so *has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency.* It follows from this that *disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.*" (Emphasis ours.)

Among the authorities cited in the *Holt State Bank* case is the case of *Shively* v. *Bowlby*, 152 U.S. 1, 38 L.Ed. 331 (1893). As stated in *Shively* v. *Bowlby*, no grants of land have been made by Congress of lands under navigable waters in any territory of the United States unless it became necessary to do so for one of the following purposes:

(1) to perform international obligations or (2) to promote commerce with foreign nations and among the several states, or (3) to carry out the public purposes appropriate to the objects for which the United States holds the territory—and the Court in *Holt State Bank* adds (4) *that if the United States intends to dispose of lands in a territory under navigable water for any of the foregoing reasons such intent must be "definitely declared or otherwise made very plain."*

VI

THE UNITED STATES ALWAYS RETAINED THE INTENTION, THE RIGHT, AND THE POWER TO INCLUDE THE LANDS CONVEYED TO PETITIONERS IN A FUTURE STATE, EITHER THROUGH AGREEMENT WITH THEM OR OTHERWISE.

Both the Choctaws and the Cherokees, in their petitions filed herein, argue that the "equal footing" doctrine upon which *Holt State Bank* is based is inapplicable because at the time of the relevant treaties and patents the United States intended that no future state would ever be established within the boundaries of the western lands ceded to the Indian Nations which are involved in this action.

Even assuming, *arguendo*, this was then the intention of the United States, *Holt State Bank* is nonetheless applicable, for it cannot be suggested, and petitioners make no attempt to do so, that the United States also intended to cut off access to its great Louisiana purchase lands lying west and north of the Indian Territory from which many future states would be, and later were carved, and to which the Arkansas River served as an avenue. It therefore is

historically most unreasonable to assume that unborn states were not then contemplated in a connection relevant to this litigation, and that the United States thus had no reason to retain title to the Arkansas River bed.

But we need not merely assume that future states were considered, nor that they were perceived as likely only in areas outside that granted the Indian Nations.

Article III of the "foundation document," the treaty of April 30, 1803 between the United States and France culminating the Louisiana purchase, provided as follows:

> "The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the federal constitution and the enjoyment of all rights, advantages and immunities as citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property and the religion which they profess."

President Thomas Jefferson, in submitting this treaty to the Senate for ratification on October 17, 1803, made this comment:

> "Whilst the property and sovereignty of the Mississippi and its waters secure an independent outlet for the produce of the Western States and an uncontrolled navigation through their whole course, free from collision with other powers and the dangers to our peace from that source, the fertility of the country, its climate and extent, promise in due season important aids to our Treasury, an ample provision for our posterity, and a widespread for the blessings of freedom and equal laws." (Messages and Papers of the Presidents, Volume 1 at page 346.)

The division of the newly acquired territory into future states was considered by Congress as well:

> "Many complained bitterly of paying fifteen million dollars for the territory from which were to be carved Louisiana, Arkansas, Missouri, Oklahoma, Kansas, Nebraska, the two Dakotas, the greater part of Idaho and Montana, and parts of Texas, New Mexico, Colorado and Wyoming. An outrageous price! Rufus King, in his loftiest mood, was sure that with his diplomacy it could have been had for much less. They all agreed it was unconstitutional. But deep down, the resentment of the extreme New England Federalists was that *with the States ultimately to be carved from the new territory,* the dominance of their section would be lost" Bowers, "Jefferson In Power," at page 213. (Emphasis ours.)

And the idea that the Indian lands themselves might constitute a future state was presented directly to the Cherokees during the treaty negotiations. In a letter from Elias Boudinot to John Ross, Chief of the Cherokees, dated November 25, 1836, Boudinot stated:

> "According to the treaty, in no future time is a territorial government to be formed over these lands without the consent of the Cherokees. From these plain provisions you build an argument to show that the Indian title is subject, not only to Act of May, 1830, and to similar acts, but to other acts which may hereafter be made, and that if the government should see fit to organize a territory over the Cherokee country, the nation will become legally extinct, and the lands will revert to the United States and hence the title pretended to be given in the treaty is good for nothing. *This no doubt is conclusive reasoning from the premises.*" (Emphasis ours.) Senate Document No. 281, 52nd Congress, 1st Session.

Commissioner Schermerhorn, who signed for the United States in the treaty of New Echota, also mentioned this possibility, although Schermerhorn suggested Indian acquiescence in a future state:

> "I do not advise you to remove merely to get rid of your difficulties and the deadly influence by which you were surrounded, *but I look forward with confidence to the day when your several tribes of Indians shall there be organized into a territorial government,* with the rights and privileges of American citizens; *and that the time will yet come, when an Indian State will be added to our Federal Union;* and which, though the last, will be the brightest star and fairest stripe upon the banner of our nation, and fill up the measure of our country's glory." (Emphasis ours.) Papers and Correspondence on the Removal of Cherokees (1835-37); U. S. Department of Interior Library, E99 C5 U5.

But more convincing, and more to the point, whatever statements were made during negotiations, and however the treaties were worded, is the language of the title instruments themselves: the patents from the United States to the respective Indian Nations. With respect to all the lands granted, we have here not grants in fee simple absolute, but rather grants reflecting the obvious expectation of the United States that the establishment of the respective Indian Nations in their new locations might be merely temporary.

The Choctaw patent begins:

> "The United States under a grant specially to be made by the President of the United States shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River in fee simple, to them and their descendants, *to inure to them while they*

shall exist as a nation and live on it. . . ." (Emphasis ours.) (Patent Records, U. S. Dept. of the Interior.)

Similarly, the Cherokee patent concludes:

"TO HAVE AND TO HOLD THE SAME, together with all the rights, privileges and appurtenances thereunto belonging, to the said CHEROKEE NATION FOREVER, subject . . . and subject also to the condition provided by the Act of Congress of the 28th of May, 1830, referred to in the above recited third article, *and which condition is that the lands hereby granted shall revert to the United States if the Cherokee Nation ceases and abandons the same . . .*" (Emphasis ours.) (Patent Records, U. S. Dept. of the Interior.)

Thus, on the face of the grants it is apparent that the United States retained residual title to all lands granted and that it consequently cannot be said as a matter of law, that the treaties and grants taken together conclusively preclude the possibility that future states were contemplated in the territories conveyed to the Indian Nations. This being so, the "equal footing" doctrine enunciated in *Pollard* v. *Hagan* is just as applicable to the lands which later became the State of Oklahoma as it was, in *Holt State Bank*, to those from which the State of Minnesota was formed.

Moreover, shortly before Oklahoma became a state, agreements were made by the United States with the Choctaws and Chickasaws and with the Cherokees for the relinquishment of tribal sovereignty and the allotment of the tribal lands in severalty and in fee to the tribal members and their freed slaves. This was tersely expressed in the opinion of the Court of Appeals as follows:

"In 1893, Congress created a commission to negotiate with the Cherokees, the Choctaws, and other tribes for the extinguishment of the tribal titles to land,[13] and the allotment of land to the individual members of the tribes. *The result was an agreement with the Cherokees*[14] *and with the Choctaws*[15] *which nullified treaties inconsistent therewith and which provided for the allotment of the lands.* These agreements were followed by the Act of April 26, 1906, 34 Stat. L. 137, which provided for final disposition of the affairs of the Five Civilized Tribes.[16] This Act required that lands belonging to the tribes on their dissolution shall be held by the United States in trust for the use and benefit of the Indians."[17] (Emphasis ours.)

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[13] 27 Stat. L. 612, 645.

[14] 32 Stat. L. 716, 727.

[15] 32 Stat. L. 641, 656.

[16] These included the Chickasaws, Creeks, and Seminoles, in addition to the Cherokees and the Choctaws.

[17] 34 Stat. L. 148.

VII

COMMENTS ON MEMORANDUM OF UNITED STATES AS AMICUS CURIAE.

Several contentions raised by the United States in its memorandum require brief comment:

1. The statement is made, with reference to *Holt State Bank,* that: ". . . the court of appeals concluded that the United States intended to reserve title to the river bed circumscribed by the grants . . ." The Court of Appeals did not hold that there was any *reservation* of title but instead held that the United States simply *did not convey*

the title to the river bed. Since there was no conveyance by the United States of the river bed, no *reservation* was necessary.

2. The further statement is made that: ". . . If these had been private conveyances, there could be no question that a strip of land underlying a navigable river meandering through the blocks of land granted would be embraced in the grants. . . ." This completely disregards the law of Oklahoma that the beds of navigable streams between the high water marks belong to the State. *City of Tulsa* v. *Commissioners,* 101 P.2d 246 (1940); and *Lynch* v. *Clements,* 263 P.2d 153 (1953).

3. There is yet another fallacy in this memorandum. On page 6, where the United States contends that: ". . . the present cases pose an appropriate opportunity for this court to determine the degree of specificity required to make a showing that the government intended to transfer river beds to Indians rather than to reserve them in trust for a state whose potential creation was disavowed.", begs the question at issue and assumes the fact of a *reservation.* As pointed out above, the courts below held that the United States did not convey the river bed; therefore, no reservation was necessary.

4. The United States asserts that the language of the grants is "unqualified" and that the Indians acquired these tracts in fee simple. This is an incorrect statement. As shown in Section VI of this brief, the treaties and patents resulted in *qualified* grants, with reverter to the United States when the Cherokees and Choctaws ceased to exist as nations or to live upon the land.

5. The United States further asserts that there was no purpose for the United States to retain ownership of the Arkansas River. It is true that navigability of the river was not an issue in the Court of Appeals, all parties having recognized in that Court that the stretch of Arkansas River which is the subject of the suit is navigable in fact. However, this statement by the United States ignores these facts which are well known: The Arkansas River, from Ft. Smith at the Arkansas state line to Ft. Gibson at the confluence of the Arkansas and Grand Rivers, was a main artery of commerce before 1824. There were twenty-two established landings between Ft. Smith and Ft. Gibson. At the time of the Louisiana Purchase there were no roads or highways and very few established trails. The highways of travel were mostly along the rivers and streams, and the Arkansas River was one of these highways. For example, in 1829, the "James O'Hara," a 200 ton steamer, carried recruits for Ft. Gibson, and 100 Cherokee emigrants. Other boats regularly using the River were the "Yellowstone," the "Victoria," the "Wyoming" which traveled from Pittsburg, Pennsylvania to Ft. Gibson, and the "Niagara" which had accommodations for 70 cabin passengers. This use of the River as a highway then, was ample reason for the United States to retain ownership of this river.

6. The government also asserts that the treaties themselves do not sufficiently manifest an intention to retain the River in trust for a "hypothetical" state. The creation of states was considered as early as 1803 by Congress. Commissioner Schermerhorn discussed it in 1835, at the conference preceding the Treaty of New Echota with the Cherokees. We submit that the Indian State envisioned by

Commissioner Schermerhorn has, in large measure, come to pass, for, as stated above, Oklahoma citizens of Indian extraction are prominent in nearly every walk of life and fully participate in the affairs of local, state, and national government. "Hypothetical" does not apply to the State of Oklahoma.

7. Lastly, we find the reference to an Alaska case, *United States* v. *Stae of Alaska, et al.* (Civil A-152-67 D.C. Alaska), wherein a United States District Court has held that under the "equal footing" doctrine Alaska received title to the lands under navigable waters within the Kenai Moose Range established for the protection of wildlife. These claims involving Alaska lands would require a completely different analysis and application of law, for these lands were the subject of withdrawals rather than the subject of treaties. No patents or treaties were involved in that case. Moreover, in its one common issue, ownership of the beds of navigable waters, the decision of the District Court in Alaska is *not* in conflict with the decisions in the courts below in this case, but on the contrary, the decision there is in total agreement.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that certiorari be denied.

Respectfully submitted,

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APPENDIX A

FILED
SEP 25 1967
JOHN B. FINK
CLERK, U. S. DISTRICT COURT
By _____
Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

Choctaw and Chickasaw Nations, Plaintiffs, v. Ella M. Tibbetts, nee Ainsworth, et al, Defendants.	)	No. 5649-Civil
State of Oklahoma, ex rel, Chas. Nesbitt, Attorney General, Plaintiff, v. Sun Oil Company, a corporation, et al, Defendants.	)	No. 6143-Civil
Choctaw Nation and Chickasaw Nation, Plaintiffs, v. Cherokee Nation, Defendant.	)	No. 6166-Civil
Cherokee Nation or Tribe, Plaintiff, v. State of Oklahoma, et al, Defendants.	)	No. 6219-Civil

PRE-TRIAL ORDER

On January 13, 1967, a conference was held in these cases at which the legal, factual, and procedural issues and problems the cases have in common were discussed and

considered. Subsequently, on January 17, 1967, the court entered a memorandum setting out the principle issues determined at the conference to have been raised by the pleadings and authorizing the filing of briefs addressed thereto. Counsel for the parties, after reasonably necessary extensions of time therefor, submitted comprehensive and exhaustive briefs, and the cases were then set for further pre-trial and for oral argument on September 8, 1967. They are now before the court for entry of a pre-trial order controlling further proceedings.

The issues common to all of the cases are these:

1. The navigability of the Arkansas River in Oklahoma below its confluence with the Grand River.

2. The ownership of the bed of the Arkansas River below its confluence with the Grand River.

3. The effect of changes in the course of the Arkansas River upon riparian ownerships and upon ownership of the bed.

4. The immunity from suit of the Indian tribes involved, and the right of the State of Oklahoma to waive its sovereign immunity.

5. Jurisdiction of this court.

The cases are consolidated only for the purpose of entering this order resolving these issues, which will be filed as a pre-trial order in each case. Otherwise, the cases will be handled separately.

The claims of the parties which give rise to these issues are briefly stated below. Allegations in the pleadings presenting legal and factual issues not involved in the other cases and not resolved in this order are not included.

CASE NO. 5649—CHOCTAW & CHICKASAW NATIONS v. TIBBETTS, et al

In this case the Nations seek to quiet title to two tracts of land in this district which they claim were never allotted to individual members of the tribes pursuant to the Act of Congress of July 1, 1902 (32 Stat. 841), later ratified as a supplemental treaty on September 25, 1902. The land identified in the complaint as Tract 1 and more fully described as the W/2 of Lots 1 and 2 of Section 12, T9N, R25E, was a riparian property lying along the east bank of the Arkansas River as shown in the government survey of 1898. The property identified in the complaint as Tract 2, the full description of which need not be repeated here, is comprised of land which in 1898 was a part of the bed of the Arkansas River but which is now, because of a shift in the course of the river, dry and useable. The Nations demand possession of the tracts and compensation for their use by the defendants since 1946.

The basis upon which the Nations rest their claim to Tract 2, the river bed land, is the treaty concluded at Dancing Rabbit Creek in Mississippi on September 27, 1830 (7 Stat. 333), between the United States and the Choctaw Nation. Under the terms of the treaty the United States in exchange for the Choctaw tribal lands in Mississippi agreed to cede to the Nation as its domain west certain lands now comprising a part of the State of Oklahoma, and pursuant to the stipulation of the treaty the President of the United States issued a patent to the lands on March 23, 1842, following congressional authorization. The lands thus ceded became the jointly owned domain of both the Choctaw Nation and the Chickasaw Nation under the provisions of a treaty between the two tribes and the United States entered into on January 27, 1827 (11 Stat. 572). Both tracts involved in this suit, the Nations claim, were included in the lands ceded under the terms of the treaty for the reason that such lands included the Arkansas River in fee simple, without reservation or limitation.

[APPENDIX]

The State of Oklahoma by Charles Nesbitt, Attorney General, for whom by order of the court there was later substituted the State of Oklahoma on the relation of Dewey F. Barlett, Governor, asked and was granted leave to intervene as a defendant. In its answer and cross-complaint the State of Oklahoma denies the plaintiffs' claim to the old river bed, asserting that at the time Oklahoma was admitted to the Union the Arkansas River was navigable and that by reason thereof the State became the owner of the river bed and remains the owner although the river has shifted to another area. The State demands that its title be quieted.

The defendant Robert G. Carter by his answer and cross-complaint denies the ownership claims of the Nations to the two tracts, and alleges ownership in himself. The portion of the former river bed included in Tract 2 and the property comprising Tract 1 have both been added to his property, he claims, which in the hands of his predecessors in title lay along the west bank of the river opposite Tract 1, by accretion through the gradual movement of the river to the east, so that it has completely vacated its former bed and passed almost entirely over Tract 1. He also denies the navigability of the Arkansas River at this juncture and demands strict proof.

The defendant Tom Frank Tibbetts, individually and as Executor of the Estate of Ella M. Tibbetts, deceased, having been substituted by order of the court for the defendant Ella M. Tibbetts, claims that the E/2 of Lots 1 and 2 of Section 12, T9N, R25E, was allotted to Ella M. Tibbetts by the plaintiffs as a member of the Choctaw Nation; that thereafter the river gradually moved to the east, engulfing within the stream the W/2 of Lots 1 and 2 by 1927, with land being added to the land on the west side of the river; that land thus added was in existence in 1936, at which time Ella M. Tibbetts went into possession of both the east and west half of Lots 1 and 2 which had thus been restored

that Ella M. Tibbetts had been claiming and using such land since 1936 and claimed title by prescription; and that he is now the owner as the sole devisee of Ella M. Tibbetts, deceased.

CASE NO. 6143—STATE OF OKLAHOMA v. SUN OIL CO., et al.

This is a suit by the State of Oklahoma to quiet its title to land which formerly constituted the bed of a section of the Arkansas River in this district and which, it is alleged, was left dry when the river course was diverted by dams and jetties constructed for that purpose by the U. S. Corps of Engineers. It is the State's position, and that of intervening parties claiming interests through the State, that the Arkansas River is a navigable stream, that the State became the owner of the river and its bed upon admission to statehood on November 16, 1907, and that it continued to be the owner of the old bed when the river was diverted to a new course. The defendants, owners of pertinent riparian properties before the change in the river, and persons claiming interests through them, deny the State's claim, asserting ownership in themselves of the river bed. The Choctaw and Chickasaw Nations have intervened by leave of court, claiming ownership of the former river bed on the same grounds alleged in Case No. 5649.

CASE NO. 6166, CHOCTAW & CHICKASAW NATIONS v. CHEROKEE NATION

The Choctaw and Chickasaw Nations have sued the Cherokee Nation to quiet the title to the bed of the Arkansas River in them throughout its course as the northern boundary of the lands ceded to the Choctaws by the United States in the treaty at Dancing Rabbit Creek in Mississippi on September 27, 1830. Title is asserted to the bed of the river as it existed in 1898 and also as it exists at present where the change from the former bed was by gradual

action, together with any land in-between. The basis for the claim is the same as that set out in Case No. 5649: that this stretch of the Arkansas River was included in the lands ceded to the Choctaws, that the river is navigable, and that the bed was not included when the Choctaw lands were allotted to members of the tribe. The case is now pending on the motion of the Cherokee Nation to dismiss for the reason that the suit was not authorized by Congress and the Cherokee Nation is therefore immune from such action.

CASE NO. 6219, CHEROKEE NATION v.
STATE OF OKLAHOMA, et al.

The Cherokee Nation in this action lays claim to the Arkansas River in Oklahoma below the mouth of the Grand River and demands an accounting for and the payment of all proceeds received by the State for oil and gas and other leases covering the bed of the Arkansas River below its confluence with the Grand. The tribe claims this portion of the river is navigable, that it acquired title to the river in fee simple by the terms of its treaty with the United States of 1833, that the river has never been allotted to individual members of the tribe, and that the State of Oklahoma does not now and never has owned any part of the river bed and has no interest which it could lease for oil or gas or other purposes. The Nation also demands all future rentals or royalties due under such leases. The State of Oklahoma and the defendants claiming interests through the State deny the plaintiff's claim, asserting title in the State, and in their counter-claim demand that their title and interest be quieted against the Cherokee Nation.

After reviewing the files and reading the excellent briefs prepared by counsel for the parties, and considering the matter thoroughly, including the oral arguments of counsel, the court has reached the conclusions hereinafter set out with respect to the issues here involved.

1. *Navigability.*

The dominant issue in all of these cases, and upon which the others hinge in the main, is the navigability of the Arkansas River from its confluence with the Grand River in Muskogee County in this district to the eastern boundary of Oklahoma, a question of fact. It is the conclusion of the court as to this issue, arrived at from documents, records, reports, and articles made and filed or published contemporaneously with the pertinent times, and from published books and research material written by students of the area and the period, all of which are as readily available to the court as to the parties, that it was common knowledge in the legal sense that from at least as early as 1824 until sometime after November 16, 1907, the Arkansas River in its natural state was a navigable river below its confluence with the Grand River, regularly used throughout the remainder of its course in what is now Oklahoma as a highway of commerce during the major portion of each year. Accordingly, it is the decision of this court, based upon judicial knowledge alone and without taking evidence, that this stretch of the Arkansas River was navigable in fact and in law at the time the western domains, now a part of Oklahoma, were ceded to the Choctaw Nation and to the Cherokee Nation, and at the time the treaties were made pursuant to which the lands were ceded, and also at the time Oklahoma was admitted to statehood on November 16, 1907.

2. *Ownership of the River Bed.*

The parts of the treaties between the United States and the Choctaw Nation and the Cherokee Nation which require construction by the court to determine the validity of their respective claims to the Arkansas River are set out in the pleadings and in the briefs submitted by counsel. After considering these and the arguments of counsel relating thereto, the court has concluded that as a matter of law regardless of the area properly included within the

boundary descriptions of the tribal domains of the Choctaws and the Cherokees in what is now Oklahoma, it was not the purpose or intent of the United States to convey to either tribe ownership of any part of the Arkansas River below its confluence with the Grand River, and that no provision of any treaty with either tribe and no act of Congress or patent issued to the tribes had this effect. This section or part of the Arkansas River became the property of the United States following the Louisiana Purchase in 1803 and remained the property of the United States until Oklahoma was admitted to the union. At that time it became the property of the State of Oklahoma by operation of law, subject to the easement or other right of the United States to do all things required to maintain or restore the river as a navigable stream and to control its use as a highway of commerce.

3. *Effect of River Movement.*

It appears from the pleadings and is assumed by counsel in their briefs that since 1907 there has been considerable shifting in the course of the Arkansas River, generally gradually and imperceptibly but sometimes suddenly, by avulsion. Actually, this is a matter of common knowledge in these parts. It is well established in Oklahoma, and this court holds, that when the change has been gradual the ownership of the bed and the navigation easement of the United States has moved with the river, riparian owners gaining or losing ground depending upon the direction of the movement. The law is also well established that an avulsive change produces no change in riparian ownership. The court is of the view that this principle applies to the ownership of the river bed as well. Where there has been an avulsive change in the river since 1907, therefore, the navigation easement of the United States has followed the new course of the river, the new bed has remained the property of the owner before the change, and the old bed, wherever it was at the time the change occurred, has re-

mained the property of the owner of the land over which the river flowed, the State of Oklahoma or others, depending on whether there had been earlier avulsive changes.

4. *Sovereign Rights.*

A question of sovereign rights runs through all of these cases, but no serious dispute appears to exist about them except as to the right of the Choctaw and Chickasaw Nations to maintain their action against the Cherokee Nation. The Choctaw and Chickasaw Nations, the Cherokee Nation, and the State of Oklahoma are all clearly authorized under the law to institute actions of the kind here involved. It is equally clear that the State of Oklahoma is empowered to waive its sovereign immunity from such suits against it and that the Indian tribes are not. These tribes may be made parties defendant in an action only to the extent and for the purpose authorized by Congress, and no such authority exists for any such suit against them. This immunity from suit and lack of authority to waive immunity obtains, in the opinion of the court, where the suit is by one tribe against another as effectively to preclude such suit from being maintained as it does to preclude suit against a tribe by an individual or by the State. Where an Indian nation intervenes in a suit to assert a claim, however, as the Choctaw and Chickasaw Nations have done in Case No. 6143, State v. Sun, it is in the case for all purposes. But under this ruling the order allowing the State to intervene against the tribes in Case No. 5649 was improvidently entered.

5. *Jurisdiction.*

Except to the extent that sovereign immunity precludes maintaining suit, the court is satisfied that it has jurisdiction over the subject matter and the parties in these actions. With all rights asserted by the plaintiffs in the suits resting on the navigable character of the Arkansas River, long held to be a federal question, and with all property involved in the controversies within this district, this is the proper court for resolution of the differences giving rise to the suits.

In accordance herewith, orders should be entered for the disposition or further proceedings in each of the cases as follows:

The motion to dismiss in Case No. 6166, Choctaw and Chickasaw Nations v. Cherokee Nation, should be granted and the action dismissed. In Case No. 6219, Cherokee Nation v. State, judgment in favor of the defendants and against the plaintiff should be entered upon the pleadings. The remaining cases, No. 5649, Choctaw and Chickasaw Nations v. Tibbetts, and No. 6143, State v. Sun, should be set separately for further pre-trial and other hearings that may be necessary in preparation for trial to determine the nature and extent of the river movement alleged in the pleadings and the effect thereof on the ownership interests of the parties, together with other pertinent issues not herein resolved.

In the opinion of the court the conclusions herein, and the orders to be entered pursuant thereto, involve controlling questions of law as to which there is substantial ground for difference of opinion, and an appeal therefrom may in each case materially advance the ultimate termination of the litigation. For that reason, further proceedings in these cases will be stayed pending resolution of the issues on appeal from this order, if allowed and taken.

EDWIN LANGLEY
District Judge

APPENDIX B

FILED
OCT 10 1967
JOHN B. FINK
CLERK, U. S. DISTRICT COURT
By _____
Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

Cherokee Nation or Tribe, Plaintiff, v. State of Oklahoma, et al., Defendants.	)	No. 6219-Civil

AMENDMENT TO PRE-TRIAL ORDER

The pre-trial order entered herein on September 25, 1967, to the extent applicable to this case is amended as follows:

The Choctaw and Chickasaw Nations have by leave of court filed a petition in intervention alleging ownership in the Arkansas River bed below the high water mark from the confluence of the Arkansas River with the Canadian River to the eastern boundary of the State of Oklahoma adversely to the claim of the Cherokee Nation to this portion of the river and adversely to the claims of the defendants.

For the reasons set out in the pre-trial order, the court is of the opinion that the claim of these tribes to this portion of the Arkansas River bed is without merit and that judgment in favor of the defendants and against the intervenors should be entered upon the pleadings.

(signed) Edwin Langley
District Judge

APPENDIX C

FILED
NOV 15 1967
JOHN B. FINK
CLERK, U. S. DISTRICT COURT
By _____
Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

The Cherokee Nation or Tribe of Indians in Oklahoma,	)	
Plaintiff,	)	
v.	)	
State of Oklahoma; Commissioners of the Land Office of the State of Oklahoma; Cities Service Oil Co.; Continental Oil Co.; Eason Oil Co.; Steve Gose; Jake L. Hamon; Humble Oil and Refining Co.; Jeffrey Sand and Gravel Co.; Lone Star Production Co.; Marathon Oil Co.; Mobil Oil Corp.; Pan American Petroleum Corp.; Skelly Oil Co.; Southland Royalty Co.; Stephens Production Co.; Sun Oil Co.; Tenneco Oil Co.; Union Oil Co. of California; and Yahola Sand and Gravel Co., a corporation;	)	No. 6219-Civil
Defendants.	)	

JUDGMENT

In accordance with the pre-trial order entered herein on September 25, 1967, and the amendment thereto entered October 10, 1967, and for the reasons therein stated,

the court is of the opinion, and so finds, that no grounds exist upon which there can be granted the relief prayed for by the plaintiff, The Cherokee Nation, or by the intervenors, the Choctaw and Chickasaw Nations, and that judgment should be entered against said Indian tribes and in favor of the defendants upon their counter-claims.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that upon being admitted to the union of states on November 16, 1907, the State of Oklahoma became by operation of law the owner of the lands comprising the bed of the Arkansas River between the high water banks from its confluence with the Grand River to the eastern boundary of Oklahoma, in the Eastern District of Oklahoma, said river being a navigable stream throughout this portion of its course, subject only to the right of the United States to maintain or restore the navigability of the river and to control its use as a highway of commerce between states; that against the Cherokee Nation and the Choctaw and Chickasaw Nations, now claiming ownership thereof as unallotted lands of their western domains, the title of the State of Oklahoma, and of all defendants herein claiming an interest through the State, is quieted and said tribes are barred and enjoined from asserting ownership or other claims adverse to said defendants; and that said Indian tribes have no right or interest in any money or other proceeds realized or which may be realized by the State of Oklahoma or the other defendants from the lease or rental or other use of said lands.

IT IS FURTHER ORDERED that each of the parties herein shall bear its own costs.

EDWIN LANGLEY
District Judge

APPENDIX D

OKLAHOMA INDIAN LAND LAWS

Second Edition

By Lawrence Mills

Published 1924

(Thompson Law Book Co.)

CHAPTER II.

AUTHORITY OF CONGRESS OVER THE INDIANS

§ 4. Title by Discovery.

5. Relation of Indian Tribes to the United States.

6. Treaty with Indian Tribe Not a Contract.

7. United States Citizenship.

8. Authority of Congress, Plenary.

§ 4. *Title By Discovery.*—Upon its discovery by Europeans, America was in the exclusive possession of the Indians, a people in a state of barbarism, who lived by hunting, and practiced agriculture only in a most limited and primitive manner. To the minds of the Europeans, America was a virgin and unpeopled continent, and they found no difficulty in convincing themselves that the natives were more than compensated for the loss of their independence by the blessings of Christianity which they were able to bestow. Accordingly, the great nations of Europe lost no time in appropriating to themselves such parts of the new world as they were able to acquire. But as each of these nations was in pursuit of the same object, it was necessary, in order to avoid war and contentions between themselves, to establish a principle governing such acquisition that should be acknowledged and observed by them all. This principle was found in the doctrine that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments. The relation between the discoverer and the Indians

who inhabited the territory, did not concern the other European nations and became a matter of policy for each nation to determine for itself.

By each of the nations, England, France, Spain and Holland, who laid claims to parts of North America by virtue of the title of discovery, the right of occupancy was recognized in the Indians, but the ultimate dominion and sovereignty of the soil was asserted in themselves. Each asserted as a corollary of its claim of ultimate dominion, the exclusive prerogative to extinguish the Indians' right of occupancy and denied to all others the privilege of acquiring any interest in the soil by grant from the Indians.

As a result of the war by which the independence of America was achieved, the United States succeeded to all of the dominion, sovereignty and right which England had theretofore had to the soil of America, except Canada, and the rights of France and Spain were afterwards acquired by purchase. The title of the United States to the land occupied and claimed by the Indians is thus based upon conquest, but its validity is a political and not a judicial question, and the manner of its acquirement was recognized as legitimate by all of the civilized nations of the world. Chief Justice Marshall has summed up the question as follows:

"We will not enter into the controversy whether agriculturalists, merchants and manufacturers have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be respecting the original justice of the claim which has been successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted a title to all of the lands occupied by the Indians within the chartered limits of the British colonies. It asserted also a limited sovereignty over them and the exclusive right of extinguishing the title which

occupancy gave to them. These claims have been maintained and established as far west as the Mississippi River by the sword. The title to a vast portion of the land we now hold, originates in them. It is not for the courts of this country to question the validity of this title or to sustain one which is incompatible with it."[1]

§ 5. *Relation of Indian Tribes to United States.*—The relation of the Indian tribes to the United States has from the beginning been of an anomalous and complex character. Though they occupied territory within the boundaries of the United States they were not a political part of the United States.[2]

Each tribe constituted a distinct, independent, political community, exercising within its territory and with respect to its internal affairs, all of the powers of local self-government and administering its own laws, customs and usages. It was, in every respect, a Nation, within the general acceptation of that term and capable of contracting treaties as such.[3]

But while the several tribes exercised all the attributes of sovereignty within their recognized tribal domains, they occupied territories to which a superior power asserted and maintained the ultimate dominion and the exclusive right to the soil upon the extinguishment of the right of occupancy conceded to the natives. The assertion of dominion by the United States was inconsistent with complete sovereignty in the Indian tribes, and the attempt of any foreign nation to enter into relations with them, or to acquire any interest in their lands, would be considered an invasion of the sovereignty of the United States and an act of hostility. By virtue of such claims of dominion, an Indian tribe was

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[1]Johnson v. McIntosh, 8 Wheaton, 574; 5 L. Ed. 541; Cherokee Nation v. Georgia, 5 Peters 48; 8 L. Ed. 296.

[2]In re Crow Dog, 109 U.S. 556; 27 L. Ed. 1030.

[3]Worcester v. Georgia, 6 Peters 575; 8 L. Ed. 483; Turner v. U. S., 248 U.S. 354; —L. Ed.—.

not, with respect to the United States, a foreign nation within the meaning of the provisions of the Constitution giving the federal courts jurisdiction of controversies "between a State or citizens thereof, and foreign states, citizens or subjects," and it could not maintain a suit therein.[4]

Full authority and sovereignty over the Indian tribes has been exercised by the Federal government through Congress from the beginning varying in the extent of its application only by expediency or the power of the United States to enforce it. Such authority of the general government does not emanate from any particular section of the Constitution and is not derived from the provision granting it "power to regulate commerce with foreign nations, and among the several States and with the Indian tribes." It is much broader than that. It is an inherent one, arising from its political relations with those dependent people. This sovereignty of the government is exercised through Congress as the instrument established by the Constitution for the expression of its legislative will. Justice Miller in United States v. Kagama, has outlined the source of the authority of the Federal government over the Indian Tribes as follows:

"The power of the General Government over these remnants of a race, once powerful, now weak and diminished in numbers, is necessary to their protection as well as to the safety of those among whom they dwell. It must exist in that government because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its law on all the tribes."[5]

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[4]Cherokee Nation v. Georgia, 5 Peters 48; 8 L. E. 296; Cherokee Nation v. Southern Kan. Ry. Co., 135 U.S. 641, 34 L.E. 295; Choctaw Nation v. United States, 179 U.S. 494, 45 L.E. 291; United States v. Rogers, 4 Howard 572; 11 L.E. 1105; Jones v. Meehan, 175 U.S. 1, 44 L.E. 49.

[5]United States v. Kagama, 118 U.S. 375, 30 L.E. 228; Stephens v. Cherokee Nation, 174 U.S. 445, 43 L.E. 1041.

The tribes were declared by Chief Justice Marshall in Cherokee Nation v. Georgia, to be in a "state of pupilage," and their relation to the United States to be that of a ward to his guardian. Such designation has been generally adopted by the courts as expressive of the authority of the United States over the Indian tribes, who are usually referred to as "wards of the Nation," "pupils," "local dependent communities."

By reason of the relation between the United States and the tribes, the exercise of its authority is a political question, addressing itself solely to Congress and not subject to control by the courts. Congress has plenary power and authority over the tribes, tribal affairs and property when it sees fit to exercise it, and from the very nature of the relation, there is no authority above Congress that they can invoke.[6]

§ 6. *Treaty With Indian Tribe Not a Contract.*—It has been the practice of the United States from the beginning of the government to the present time to exercise its paramount authority over the Indians by treaties negotiated with the different tribes. Such treaties are not contracts and confer no vested rights upon the tribes which are within the protection of the Constitution. They are effective, not as treaties but as acts of Congress and do not impair the power of Congress to further legislate upon the same subject matter, even in violation of the terms of the treaties.

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[6]United States v. Kagama, 118 U.S. 375, 30 L.E. 228; Cherokee Nation v. Southern Kan. Ry. Co., 135 U.S. 641, 34 L.E. 295; Choctaw Nation v. United States, 179 U.S. 494, 45 L.E. 291; Stephens v. Cherokee Nation, 174 U.S. 445, 43 L.E. 1041; United States v. Rogers, 4 Howard 572, 11 L.E. 1105; Ward v. Race Horse, 163 U.S. 504, 41 L.E. 244; In re Crow Dog, 109 U.S. 556, 27 L.E. 1030; M.K. & T. Ry. Co. v. Roberts, 152 U.S. 114, 38 L.E. 377; Thomas v. Gay, 169 U.S. 264, 42 L.E. 740; Cherokee Nation v. Hitchcock, 187 U.S. 298, 47 L.E. 183; Lone Wolf v. Hitchcock, 187 U.S. 553, 47 L.E. 299; Tiger v. Western Investment Co., 221 U.S. 285, 55 L.E. 738; Heckman v. United States, 224 U.S. 413, 56 L.E. 820; Gritts v. Fisher, 224 U.S. 639, 56 L.E. 928; Choate v. Trapp, 224 U.S. 665, 56 L.E. 941; Williams v. Johnson, 239 U.S. 414, 60 L.E. 358; 32 Okla. 247; Winton v. Amos, 255 U.S. 373, 65 L.E. 684.

Whatever may be the moral obligation to keep inviolate the treaties entered into with the Indian tribes, the sovereignty of the United States cannot be concluded by its own legislative enactments, should occasion arise for the further exercise of its authority.[7]

Where, however, rights have vested in the individual as distinct from the tribe, under a treaty or act of Congress, such rights are within the protection of the Constitution and cannot be divested by subsequent act of Congress.[8]

§ 7. *United States Citizenship.*—The Indian tribes were not a political part of the United States, and prior to March 3, 1901, the members of the Five Civilized Tribes were not citizens of the United States. By the General Allotment Act of February 8, 1887, every Indian born within the United States to whom an allotment was made was declared to be a citizen of the United States with all the rights, privileges and immunities thereof. The Five Civilized Tribes were excluded from the General Allotment Act, but by Act of March 3, 1901, section 6 of that Act was amended by the insertion in the appropriate place, of the words "and every Indian in Indian Territory." By such amendment United States citizenship was bestowed upon all the members of the Five Civilized Tribes.[9]

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[7]Lone Wolf v. Hitchcock, 187 U.S. 553, 47 L.E. 299; Cherokee Tobacco v. United States, 11 Wall, 616, 20 L.E. 227; United States v. Kagama, 118 U.S. 375, 30 L.E. 228; Choctaw Nation v. United States, 179 U.S. 494, 45 L.E. 291; Stephens v. Cherokee Nation, 174 U.S. 445, 43 L.E. 1041; United States v. Rogers, 4 Howard 572, 11 L.E. 1105; Ward v. Race Horse, 163 U.S. 504, 41 L.E. 244; Thomas v. Gay, 169 U.S. 264, 42 L.E. 740; Cherokee Nation v. Hitchcock, 187 U.S. 298, 47 L.E. 183; Tiger v. Western Investment Co., 221 U.S. 286, 55 L.E. 738; Gritts v. Fisher, 224 U.S. 640, 56 L.E. 928; Choate v. Trapp, 224 U.S. 665, 56 L.E 941.

[8]Choate v. Trapp, 224 U.S. 665, 56 L.E. 941; Jones v. Meehan, 175 U.S. 1, 44 L.E. 49.

[9]Godfrey v. Iowa Land & Trust Co., 21 Okla. 293, 95 Pac. 792; Heckman v. U.S., 224 U.S. 410, 56 L.E. 820; Wiley v. Edmondson, 43 Okla. 7, 133 Pac. 38.

They acquired State citizenship upon the admission of Oklahoma into the Union.[10]

§ 8. *Authority of Congress, Plenary.*—The plenary authority, often called guardianship, of Congress over the tribe, tribal affairs and tribal property, authorizes, with or without the consent of the tribe, the dissolution of the tribe, the distribution and allotment of the tribal property and the imposition of such restrictions upon the alienation of the lands of the members, wherever and in such manner, as Congress may in its judgment deem expedient.[11]

The passage of the Act of June 28, 1898 (Curtis Act), was a valid exercise of the legislative authority of Congress over the Five Civilized Tribes.[12]

And the authority of Congress to distribute and allot the lands of the tribes in severalty to the members thereof necessarily included the authority to ascertain and declare who should constitute the membership of the tribes and share in the distribution of the land.[13]

And as a part of its plan of allotment in severalty and for the purpose of protecting the Indians in the enjoyment of their lands, it was authorized to impose upon the land of the individual members limitations or restrictions upon its alienability.[14]

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[10]Tiger v. Western Investment Co., 221 U.S. 285, 55 L.E. 738; Chisholm v. Creek & Indiana Development Co., 273 Fed. (DC) 589.

[11]Lone Wolf v. Hitchcock, 187 U.S. 553, 47 L.E. 299; Cherokee Nation v. Hitchcock, 187 U.S. 208, 47 L.E. 183; Tiger v. Western Investment Co., 221 U.S. 285, 55 L.E. 738; Heckman v. United States, 224 U.S. 413, 56 L.E. 820.

[12]Stephens v. Cherokee Nation, 174 U.S. 445, 43 L.E. 1041; Cherokee Nation v. Hitchcock, 187 U.S. 294, 47 L.E. 183.

[13]Gritts v. Fisher, 224 U.S. 640, 56 L.E. 928.

[14]Tiger v. Western Investment Co., 221 U.S. 285, 55 L.E. 738; Williams v. Johnson, 239 U.S. 414, 60 L.E. 358; Brader v. James, 49 Okla. 734, 154 Pac. 560, 246 U.S. 88, 62 L.E. 335.

Nor was its power exhausted when the land was allotted in severalty subject to the restrictions it had imposed. Such allottees, with respect to their allotted lands are still tribal Indians and subject to the guardianship of Congress until that guardianship shall be terminated by Congress itself; and it is for it to say when and under what conditions that guardianship shall cease. Accordingly, it has been held that the United States may maintain suits in its own name for the purpose of enforcing the restrictions it has imposed upon the alienation of the lands of the allottees of the several tribes.[15]

It may remove the restrictions prior to the expiration of the time originally prescribed.[16]

Or extend the restricted period beyond the original term.[17]

Or impose restrictions upon lands, which were at the time subject to unrestricted alienation.[18]

And such power in Congress is not inconsistent with United States citizenship in the Indians or affected by such citizenship.[19]

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[15]Heckman v. United States, 224 U.S. 413, 56 L.E. 820; Mullen v. United States, 224 U.S. 448, 56 L.E. 834; Goat v. United States, 224 U.S. 458, 56 L.E. 841; Deming Investment Co. v. United States, 224 U.S. 471, 56 L.E. 847.

[16]Williams v. Johnson, 239 U.S. 414, 60 L.E. 358, 32 Okla. 247, 122 Pac. 485; McIntosh v. Dill, 86 Okla. 1, 205 Pac. 917.

[17]Heckman v. United States, 224 U.S. 413, 56 L.E. 820; Tiger v. Western Investment Co., 221 U.S. 285, 55 L.E. 738.

[18]Brader v. James, 49 Okla. 734, 154 Pac. 560, 246 U.S. 88, 62 L.E. 335.

[19]Tiger v. Western Investment Co., 221 U.S. 286, 55 L.E. 738; Heckman v. United States, 224 U.S. 413, 56 L.E. 820; Choate v. Trapp, 224 U.S. 665, 56 L.E. 941; Brader v. James, 49 Okla. 734, 154 Pac. 560, 246 U.S. 88, 62 L.E. 335; Winton v. Amos, 255 U.S. 373, 65 L.E. 684.